STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2007
v	No. 266833 Oakland Circuit Court
ANDRE MARTEZ STALLWORTH, Defendant-Appellant.	LC No. 2004-198499-FC

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of armed robbery, MCL 750.529, one count each of felon in possession of a firearm, MCL 750.224f, and felonious assault, MCL 750.82, and five counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 29 to 60 years for each of the armed robbery convictions, 3 to 7-1/2 years for the felon-in-possession conviction, and 2 to 6 years for the felonious assault conviction, to be served consecutive to five concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right and claims ineffective assistance of counsel relative to the offense variable scoring at sentencing. Because the record supports the trial court's scoring of all four offense variables challenged on appeal, defendant has not established that his attorney was ineffective and we affirm.

Defendant argues that defense counsel was ineffective for failing to object to the trial court's scoring of the sentencing guidelines. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000) To establish ineffective assistance of counsel, defendant must show both that counsel's performance fell below an objective standard of reasonableness and resulting prejudiced. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defense counsel was not ineffective for not objecting to the trial court's use of information not reflected in the jury's verdict to score the guidelines. In support of this argument, defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in which the United States Supreme Court struck down as violative of the Sixth

Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, counsel was not ineffective for not objecting on this basis.

Defendant also argues that defense counsel was ineffective for not objecting to the scoring of offense variables (OV) 3, 4, 9, and 19. A trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

OV 3 assesses points for physical injury to the victim, MCL 777.33. Ten points are to be scored if "[b]odily injury requiring medical treatment occurred to a victim." Five points are scored if bodily injured occurred not requiring medical treatment, and no points should be scored if no physical injury occurred to a victim. The phrase "requiring medical treatment" refers only to the need for medical treatment, not whether the victim actually obtained treatment. MCL 777.33(3). The presentence report indicates that one of the robbery victims, Norbert Fillip, suffered an injury to his shoulder after defendant struck him in the back of the neck and in the head area with a pistol, knocking him to the ground. In addition, the trial court noted at sentencing that bystanders were injured during the police chase and crash that occurred when defendant and his codefendant fled from the police. Defendant has not demonstrated that counsel was ineffective for failing to object to the trial court's scoring of OV 3.

The trial court scored OV 4 at ten points. Pursuant to MCL 777.34(1)(a), OV 4 should be scored at ten points where "[s]erious psychological injury requiring professional treatment occurred to a victim." A ten-point score is proper if the serious psychological injury *may* require professional treatment. The fact that treatment has not been sought is not conclusive. MCL 777.34(2). In *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006), this Court held that OV 4 was properly scored at ten points where "the victim testified that she was fearful during the encounter with defendant." In this case, Beverly Drain, a robbery victim, testified that she was very afraid for herself and her daughter, particularly because defendant pointed at her stomach and she observed defendant push another victim down. Drain testified at trial that while she was not physically hurt, she was "emotionally hurt" because defendant "petrified" her "to death." We conclude from Drain's trial testimony that the level of her fear may require professional treatment and supports the trial court's score of ten points for OV 4. Therefore, counsel was not ineffective for failing to object to this scoring decision.

The trial court scored 25 points for OV 9, which is based on the number of victims. The instructions provide that 25 points are to be scored if there are ten or more victims. MCL 777.39(1)(b). Each person who was placed in danger of injury or loss of life is a victim. MCL 777.39(2)(a). See *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). In this case, there were five victims inside the store that was robbed, at least three police officers were directly involved in the police chase that led to defendant's apprehension, and numerous other civilians were also placed in danger of injury during the police chase and resulting crash. Because it is apparent that more than ten individuals were placed in danger of injury, defense counsel was not ineffective for not challenging the trial court's 25-point score for OV 9.

The trial court scored ten points for OV 19. Ten points are to be scored for this variable where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." In *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004), our Supreme Court held that the phrase "interfered with or attempted to interfere with the administration of justice" includes more than just judicial proceedings. It can include conduct affecting the duties fulfilled by law enforcement officers, including their investigation of crimes. Therefore, "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Id*. at 288.

Defendant's reliance on *People v Deline*, 254 Mich App 595, 597-598; 658 NW2d 164 (2002), to argue that his prearrest behavior cannot support the trial court's scoring of OV 19 is misplaced. Our Supreme Court vacated in part this Court's decision in *Deline* "to the extent that it is inconsistent with the Court's decision in *People v Barbee*, 470 Mich 283 (2004)." *People v Deline*, 470 Mich 895; 683 NW2d 669 (2004). In this case, defendant interfered with the law enforcement officers who were trying to arrest him by participating in a multi-city police chase that resulted in a crash. During that chase, a gun used in the robbery was thrown from the vehicle that defendant occupied. Under *Barbee*, this evidence was sufficient to support the trial court's scoring of OV 19 at ten points.

Because the record supports the trial court's scoring of all four offense variables challenged on appeal, defendant has not established that his attorney was ineffective for failing to object to the court's scoring decisions. See *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio